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NO. 86-1789

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES AND GEORGE CHONGRIS,

Petitioners-Appellants,

v.

BOARD OF APPEALS OF THE TOWN OF ANDOVER, et al.,

Respondents-Appellees.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF STATE RESPONDENT-APPELLEE IN OPPOSITION

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QUESTION PRESENTED

Whether the post-revocation appeal provisions of the Massachusetts Zoning Act provide an adequate state law remedy under the Due Process Clause of the Fourteenth Amendment to the United States Constitution for a developer whose building permit is revoked by a local zoning board, and whether the pre-revocation notice and hearing provisions of that statute comply with due process.

PARTIES

This Brief in Opposition is submitted on behalf of the Attorney General of the Commonwealth of Massachusetts who intervened as a defendant in the District Court for the sole purpose of defending the facial validity of §§ 11, 15, and 17 of Mass. G. L. c. 40A, the state Zoning Act.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 1a-31a) is reported at 811 F.2d 36 (1st Cir. 1987). The opinion and

judgment of the District Court (Pet. 32a-44a) is reported at 614 F. Supp. 998 (D. Mass. 1985).

STATEMENT OF THE CASE

In August, 1979, over the objection of a neighborhood group known as the Friends of Shawsheen Village Association ("Association"), the building inspector of the Town of Andover, Massachusetts, issued a building permit to the petitioners-appellants, James and George Chongris (Chongrises), to convert a building to a Dunkin Donuts franchise. Pet. 4a, 33a-34a.

On or about August 30, 1979, the Association filed with the Town a letter, seeking, pursuant to Mass. G.L. c. 40A, §§ 8 and 15, to appeal the building inspector's granting of the building per-

mit. Pet. 5a, 14a, 34a. Thereafter, the Association filed a formal petition with the Town of Andover zoning board of appeals ("zoning board") pursuant to Mass. G.L. c. 40A, § 8, for review of the building inspector's granting of the building permit. Id. Their petition rested on four specified grounds. Id.

Notice of a public hearing to be held on their petition on November 1, 1979, was given by publication and by mail. Pet. 5a, 13a-15a, 34a. The Chongrises received such notice. Id. The notice recited, among other things, the date, place, and time of the hearing, and the grounds for the petition. Id.

The November 1, 1979 public hearing before the zoning board was attended by various persons, including James Chongris and the Chongrises' attorney,

both of whom spoke at the hearing. Pet. 5a, 34a, 52a-57a.

The zoning board voted unanimously on November 13, 1979, to reverse the building inspector's decision and issued a written decision ordering him to revoke the building permit. Pet. 5a, 34a, 52a-57a.

Thereafter, the Chongrises filed, pursuant to Mass. G.L. c. 40A, § 17, an action in state Superior Court seeking judicial review of the zoning board's decision. Pet. 5a-6a, 34a-35a, 45a-49a, 51a. On December 29, 1982, the Superior Court annulled the zoning board's decision on the ground that the zoning board lacked jurisdiction because the Association had no standing to appeal the building inspector's decision. Pet. 35a, 51a.

The zoning board and the Association appealed from the judgment and the Chongrises cross-appealed. Pet. 9a, 35a, 45a-49a. The state Appeals Court affirmed the Superior Court judgment on February 15, 1984. Pet. 9a, 45a-49a; Chongris v. Board of Appeals, 17 Mass. App. Ct. 999, 459 N.E.2d 1245 (1984).[1/]

In the meantime, in 1980 the Chongrises filed the present civil rights action in District Court pursuant to 42 U.S.C. § 1983 (Pet. 7a), against the zoning board and its members and the Town seeking, among other things, compensatory damages for the revocation of

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1/ The Appeals Court also entered an order awarding the Chongrises double costs and an attorney's fee of $1,000 in connection with the appeal, Pet. 9a, 50a, which the Association paid to the Chongrises.

their building permit. In March, 1985, they filed a second amended complaint which, among other things, placed in issue the facial constitutionality of sections of the Massachusetts zoning statute. Pet. 10a, 25a-28a. In particular, they alleged that the post-deprivation remedy under Mass. G.L. c. 40A, § 17, of which they successfully availed themselves in state court is an inadequate state law remedy which violates the due process clause because it does not provide for compensatory damages in any case, or for costs in cases of non-negligent, good faith error. Pet. 26a.

As to the pre-revocation notice and hearing provisions of the zoning statute, the petitioners' complaint was a confusing mixture of a constitutional attack on the statute on its face and as ap-

plied. Pet. 25a-26a, 11a-12a. They alleged that Mass. G.L. c. 40A, § 11 (second paragraph), violates the due process clause because it does not provide adequate notice of contemplated or possible adverse zoning board action to a property-owner whose building permit is the subject of an appeal. Id. They further alleged that Mass. G.L. c. 40A, § 15, violates the due process clause because it fails to specify the rights to be afforded applicants or property owners at hearings before zoning boards of appeals and does not provide the rights to testify, to present evidence and argument, to call and cross-examine witnesses, to be represented by counsel, to answer and refute allegations, arguments, claims and evidence of adverse witnesses, and to defend and explain one's entitlement to a permit. Id.

In light of the petitioners' challenge to the facial validity of Mass. G.L. c. 40A, the Attorney General of the Commonwealth of Massachusetts intervened. See Mass. G.L. c. 231A, § 8. Pet. 9a.

On July 30, 1985, the District Court allowed the defendants' motion to dismiss on grounds of res judicata. Pet. 9a, 32a-44a. The Chongrises appealed, and on February 12, 1987, the Court of Appeals affirmed the judgment but on a different ground than that relied on by the District Court; the Court of Appeals decided that the petitioners had failed to state a claim for relief under federal law. Pet. 1a-31a and n. 1.

REASONS FOR DENYING THE WRIT

The petitioners persist in their attempt to fashion their situation into a

constitutional case of paramount importance when, in reality, it is a run of the mill dispute between a developer and a local zoning board over the revocation of a building permit. Such disputes are common fare of the Massachusetts courts; indeed, since 1979 when the controversy here started, the Massachusetts appellate courts alone have entertained some ninety-three cases involving zoning appeals under Mass. G.L. c. 40A, § 17.[2/] The petitioners offer no substantial reason why that body of litigation should be federalized. As the Court of Appeals aptly stated: "Although the second amended complaint is a massive document . . . a linguistic avalanche cannot serve to make out a constitutional claim where none exists . . . . No matter how assiduously Aladdin's Lamp is rubbed, the ge-

nie of federal jurisdiction does not appear . . . ." Pet. 30a.

The Court of Appeals decision is consistent with numerous precedents of that Court over the past several years involving zoning (or licensing) disputes (in two of which a writ of certiorari was sought and denied),[3/] and with this Court's decisions in Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer, 468 U.S. 517 (1984). The petitioners do not suggest that the decision is inconsistent or in conflict with decisions of other circuits. Furthermore,

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2/ This is based on a Lexis search done on June 2, 1987 by undersigned counsel using the search "40A w/10 17 and date aft 1/1/79." It is not possible to determine in any easy manner the number of such cases filed in state Superior Court during that period.

the decision is correct. Petitioners' last minute recharacterization in this Court of their case as a "takings" case under the Just Compensation clause (Pet. 9-10) should not be considered and, in any event, is misguided. For all of these reasons, the petition for a writ of certiorari should be denied.

A. The Statute Provides An "Adequate" And "Meaningful" State Law Remedy.

The Chongrises admit that Massachusetts law provided a procedure in state court to annul the decision of the zoning board and to restore to them their build-

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3/ See Raskiewicz v. The Town of New Boston, 754 F.2d 38 (1st Cir.), cert. denied, 106 S. Ct. 135 (1985); Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir.), cert. denied, 459 U.S. 989 (1982).

ing permit. Pet. 26a. Nevertheless, they claim that neither the procedures of Chapter 40A or Chapter 231A (the state Declaratory Judgment Act) of the Massachusetts General Laws provides them with due process because neither provides full monetary compensation for losses they suffered as a result of the zoning board's good-faith revocation of the building permit.[4/]

4/ The zoning board members are immune from costs under Mass. G.L. c. 40A, § 17, unless the board acts with "gross negligence, in bad faith, or with malice." They are likewise immune from damages under Massachusetts common law. See, e.g., Gildea v. Ellershaw, 363 Mass. 80, 298 N.E.2d 847 (1973); Ramos v. Board of Selectmen of Nantucket, 16 Mass. App. Ct. 308, 450 N.E.2d 1125 (1984). The Town of Andover is also immune. Pet. 11, 10a, 26a.

To be adequate under the due process clause, a state law remedy need not provide a plaintiff with all of the relief or the same relief which might be available to him under 42 U.S.C. § 1983. See Hudson v. Palmer, 468 U.S. 517, 535-36 (1984); Parratt v. Taylor, 451 U.S. 527, 543-44 (1981). In Hudson, this Court reiterated its holding in Parratt, supra, that deprivation of property does not violate the due process clause if the state "makes available a meaningful post deprivation remedy," Hudson, 468 U.S. at 533 (emphasis added), and that the fact that one might not be able to recover through state law remedies "the full amount which he might receive in a § 1983 action is not . . . determinative of the adequacy of the state remedies." Hudson, supra, 468 U.S. at 535. The inevitable

costs of regulatory error in a highly regulated society may include delay, litigation expenses, and revenue losses. But these are ordinary costs which do not implicate the Constitution. E.g., Williamson Planning Commission v. Hamilton Bank, 473 U.S. 172, 204-05 (Stevens, J., concurring); Roy v. City of Augusta, Maine, 712 F.2d 1517, 1523 (1st Cir. 1983). In Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975), this Court reaffirmed the "American Rule" that each side in litigation bears its own attorney's fees unless there is "bad faith" or a statute that provides the losing party must pay the winning party's fees. To suggest, therefore, that the Due Process clause is violated in this case because the Chongrises cannot recover, inter alia, their attorney's fees

(Pet. 11-13) is to suggest that the "American Rule" itself is unconstitutional. Surely, that is not the case.

The decision in this case is also consistent with numerous decisions of the Court of Appeals for the First Circuit finding statutory remedies in zoning and business regulation cases to be "adequate" and "meaningful" under the Due Process clause. Compare Alton Land Trust v. Town of Alton, 745 F.2d 730 (1st Cir. 1984), Quinn v. Bryson, 739 F.2d 8, 9 (1st Cir. 1984), Cloutier v. The Town of Epping, 714 F.2d 1184, 1189 (1st Cir. 1983), Chiplin Enterprises, Inc. v. City of Lebanon, 712 F.2d 1524, 1528 (1st Cir. 1983), and Clark v. Bissonnette, 604 F. Supp. 710, 713 (D. Mass. 1985) (state review procedures satisfy due process despite delay and extra costs) with Roy

v. City of Augusta, Maine, 712 F.2d 1517, 1523 (1st Cir. 1983) (where plaintiff lost the premises due to foreclosure as a result of local board flouting the mandate of the state supreme court, and state court could not award money damages therefor, state court's granting of a license was not an "adequate" remedy).[5/]

Like the aggrieved plaintiffs in Alton, Cloutier, Quinn, Chiplin, and Clark, supra, the Chongrises had a state procedure to follow, they followed it, they ultimately prevailed, and they still own the land and can benefit from the building permit. Also like the plaintiffs in

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5/ Cf. Limerick v. Greenwald, 749 F.2d 97, 99 (1st Cir. 1984) and Roslindale Cooperative Bank v. Greenwald, 638 F.2d 258, 260 (1st Cir.), cert. denied, 454 U.S. 831 (1981) (plaintiffs' due process claim fails on merits because there was a process available under state law for review of removal and certification decisions by Commissioner of Insurance).

those cases, the Chrongrises suffered delays and extra costs as a result of the defendants' action and pursuit of state judicial remedies. Nevertheless, as recognized in each of those cases, the state procedure was adequate and did not violate the due process clause. Accord Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 831-34 and n. 9 and cases cited (1st Cir.), cert. denied, 459 U.S. 989 (1982).

Were the plaintiffs' theory to prevail, federal courts would be inundated with Section 1983 claims by disappointed and disgruntled -- indeed, even, as here, prevailing -- developers, landowners, and others.[6/] The federal courts would

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6/ As noted above, since 1979, the Massachusetts appellate courts alone have decided some ninety-three zoning appeals.

(footnote continued)

become super zoning boards of appeals embroiled in local zoning and planning disputes, and state schemes for administrative and judicial review and redress would thereby be circumvented and undermined.

For all these reasons, a writ of certiorari should not be granted.

B. The Pre-Deprivation Notice and Hearing Provided By The Statute Satisfy Procedural Due Process.

The petitioners claim that the notice provision of Chapter 40A, § 11, violates the due process clause because the notice

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(footnote continued)

Contrary to petitioners' argument (Pet. 17-18), the cases cited at Pet. 17-18 are inapposite -- they involved constitutional attacks on the facial validity of restrictive local zoning ordinances, not appeals from local zoning board decisions.

is not required to recite contemplated or possible adverse zoning board action or relief to one whose permit is the subject of an appeal. Pet. 13-14, 13a-16a. They also claim, in essence, that the public hearing afforded under Chapter 40A, § 15, of the Massachusetts General Laws, prior to revocation of a permit, does not comport with the due process clause because it is not a full evidentiary hearing. Pet. 14-16, 16a-18a.

The petitioners' claims are unfounded. More importantly, the petitioners have not alleged any practical harm that occurred as a result of the allegedly deficient notice or hearing. They were able to convince the Superior Court to reverse the zoning board's deci-

sion, and to persuade the Appeals Court to affirm that court's decision. Moreover, the requirements of notice and a hearing go particularly to determining factual issues. In this case, the zoning board's error was one of law -- it acted ultra vires. Thus, it is especially difficult to see what difference a different notice or hearing would have made here.

As this Court has often said "an essential principle of [due] process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case'." Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487, 1495 (1985), quoting from Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (emphasis added).

See also Atkins v. Parker, 105 S.Ct. 2520 (1985). Even where due process requires a pre-deprivation hearing, the hearing need not be elaborate. Rather, [t]he "formality and procedural requisites of the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." Cleveland Board of Education, supra, 105 S. Ct. at 1995, quoting from, Boddie v. Connecticut, 401 U.S. 371, 378 (1971). "In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." Id., quoting from Mathews v. Eldridge, 424 U.S. 319, 343 (1976).7/

7/ As the Cleveland Court recognized, there has been only one case (Goldberg v. Kelly, 397 U.S. 254 (1970)), where the Court has required a full adversarial evidentiary hearing prior to the deprivation of a property interest. Cleveland, supra, 105 S. Ct. at 1495.

Here, the notice (which was published and mailed) stated the time, date, and place of the public hearing, the petitioner's name (i.e. the Association), the location of the subject premises, and the nature of the action, namely, an appeal from the grant of the building permit. Moreover, the Chongrises had a right to see the Association's petition that was on file with the Town.[8/] They admit that they received the notice and were represented by counsel. From the notice, from the Association's petition,

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8/ Under Chapter 40A, § 15, appeals from decisions of building inspectors must specify the grounds therefor. See DiGiovanni v. Board of Appeals of Rockport, 19 Mass. App. Ct. 339, 344, 474 N.E.2d 198, review denied, 394 Mass. 1103, 477 N.E.2d 595 (1985).

and from the applicable statutes,[9] the Chongrises should have known that revocation of the permit was one avenue the zoning board could take on an appeal from a grant of a building permit. Indeed, the Court of Appeals concluded that "the appellants' belated claim that they were 'surprised' by the revocation is plainly disingenuous." Pet. 15a.

Chapter 40A, § 15, provides for a "public hearing" at which the board chairman "may administer oaths, summon witnesses, and call for the production of papers." The statute contemplates that one will be permitted to present

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9/ The Chongrises are deemed to have notice of the provisions of Chapter 40A, Cappuccio v. Zoning Board of Appeals of Spencer, 398 Mass. 304, 313, 496 N.E.2d 646 (1986), including Section 14 that delineates a zoning board's powers in such a case.

evidence and argument, to have counsel present, and to ask and answer questions, all of which the Chongrises did in this case, and it provides for a written record of the hearing, a written decision with a recorded vote and a statement of reasons, all of which was done here. Depending on the circumstances, even formal cross-examination of witnesses may be permitted.[10/] The type of hearing contemplated by Section 15 satisfies the minimal requirements of procedural due process, especially in light of the post-hearing avenue for judicial review provided by Section 17. E.g., Cloutier v. Town of Epping, 714 F.2d 1184, 1191 (1st

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10/ In this case, there is nothing in the record to indicate that the petitioners ever sought to cross-examine any witness or asked the zoning board for permission to do so. Pet. 18a n.6.

Cir. 1983)(full judicial-type hearings are not required when local boards engage in the quasi-legislative task of granting or revoking zoning or similar types of permits).

For these reasons, so much of the petitioners' second amended complaint as challenges the facial validity of Chapter 40A, §§ 11 and 15, fails to state a federal claim upon which relief can be granted and was properly dismissed.

C. This Case Does Not Involve A Taking Of Private Property For A Public Use.

Surprisingly, the petitioners assert for the first time in this Court that "This case presents the Court with the opportunity to definitively decide the due process question that has evaded

review in the taxings (sic)[11/] context . . . ." Pet. 9. This is surprising not only because this issue was not raised below, but also because this case simply does not involve a "taking" of private property for a public use. All of the cases cited by the petitioners (Pet. 9-10) are inapposite because they involve whether a local ordinance (zoning or otherwise) which regulates in a general way the types of uses a person may make of his property constitutes a regulatory taking (i.e. inverse condemnation) of private property for a public purpose under the Fifth and Fourteenth Amendments for which one is entitled to just compensation. For these reasons, the peti-

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11/ The Attorney General assumes the petitioners meant to say the "takings context."

tioners' argument does not provide a basis for granting of writ of certiorari.

CONCLUSION

For the reasons discussed herein, the Attorney General respectfully requests that the petition for a writ of certiorari be denied.

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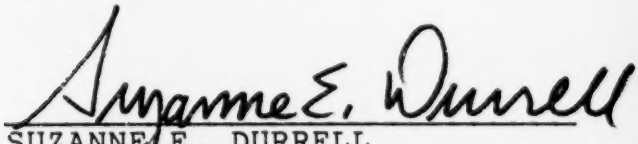

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